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A Thousand Flowers Blooming, or the Desert of the Real?
International Law and its many problems of history

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Montaigne

It is not what has been done that shocks people, but what is said about it.

Epictetus

Nehal Bhuta

A. Introduction

A young Antonio Gramsci fretted that ‘History teaches, but has no pupils.’ Today, the international, the transnational, the global, the imperial, and the colonial—and their laws and histories—have so many academic pupils that we struggle to survey the contemporary landscape. Everyone, it seems, is following Frederic Jameson’s late Marxist injunction, ‘Always historicize!’ Political theorists, international relations scholars, intellectual historians, global and international historians, legal historians (and self-described critical legal historians), literary studies scholars, as well as those unable to claim to be anything except ‘international lawyers’ by professional (de)formation, all seem to be

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1 Many scholars kindly provided comments and corrected mistakes. Those errors which remain are mine alone. With thanks to Luigi Nuzzo, Lauren Benton, Samuel Moyn, Martti Koskenniemi, Karen Knop, Thomas Duve, Megan Donaldson, Milos Vec, Matthew Craven, Jan Klabbers, Anne Peters, Randall Lesaffer, Ingo Venzke, Anthony Pagden, Quentin Skinner, Boyd van Dijk, Michelle Burgis-Kasthala, Deval Desai, Annabel Brett, and Rotem Giladi. Thanks to Geoff Gordon for an invaluable bibliographic tip. Matilde Masetti Placci provided indispensable research assistance, and also patiently corrected the text and the footnotes.


5 For one valiant and helpful attempt, see Ignacio de la Rasilla, International Law and History (Cambridge: Cambridge University Press 2021).

inquiring into the historical pasts of what we now call the international and its many law-connected objects and subjects.

The ‘turn to history’ in international law, and the ‘turn to the international and global’ in the academic disciplines of history, could only implausibly claimed to have singular origins—origin stories themselves are usually intended to sanctify or discredit. But the trends seem unmistakable: since the late 1990s, a variety of historical subdisciplines (intellectual history, cultural history, histories of political and social movements, and diplomatic history), have approached questions, objects, institutions, legal ideas—and occasionally laws and legal texts—that are ‘international’, ‘transnational’, ‘global’, or at the very least non-national. Armitage declares this ‘the most transformative historiographical movement since the rise of social history in the 1960s and the linguistic turn of the 1970s’, but notes that there is no

consensus on how these non-national approaches to history should be distinguished from each other. International historians often take for granted the existence of a society of states but look beyond state boundaries to map inter-state relationships … Transnational historians examine processes, movements, and institutions that overflow territorial boundaries … [such as] … epidemics, corporations, religions, and international social movements … And global historians treat the history and pre-histories of globalization, the histories of objects that have become universalized, and the links between sub-global arenas … The family resemblance that links these approaches is the desire to go above or beyond the histories of states defined by nations and of nations bounded by states.8

The same period (circa 1999 onwards) also witnessed a rapidly accelerating interest within international law-related scholarship, in something called ‘the history of international law’, or even ‘the history and theory of international law’. The precise denotation of these terms is usually a matter

of stipulation: ‘when I say that this is a history of international law, I mean what international lawyers do when they do history, which is …’ or ‘the history of international law is really a history of European discourses of natural law applied to the non-European world’. But stipulations such as these are unhelpful when we are trying to grasp the contours of an evolving body of discourses and writings that share, at best, some kind of family resemblance. Wherein do we see the resemblance? In titular subject matter (is international law in the title?), in method (is there a particular method of doing international legal history?), in objects of inquiry, or in some sense of the intrinsically ‘international’ (or non-national?) qualities of the inquiry?

It seems to me that no criterion can be decisive without falling back into the problems of stipulation. Rather, when we speak in the present (around here, about now) of a work or inquiry as within the family of discourses of ‘the history of international law’, we are saying that it fits within a broad network of subjects and objects, problematics, and preoccupations, that evince a concern with the historical past as it relates to something described as inter-national (or, global, transnational, universal, or planetary) and its laws (cultural and social discourses about order and morality, processes of jurisdictional conflict, positive legal texts, and perhaps soon software codes and algorithms). All of this, I would suggest, captures the kinds of inquiries we indicate when we use the term ‘the history of international law’ today.

For those seeking a sharply drawn concept, narrower stipulations are easily invented; these surely cannot be ruled out, for they depend on what one believes such an inquiry into the historical past is for. The purposes of such inquiries are—as both Nietzsche and Weber (and not only them) understood—questions of value for which many kinds of reasons can be advanced, but which are

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not susceptible to conclusive demonstration.\textsuperscript{10} But the utility of sharply drawn definitions is not always as clear as the definitions themselves (and their advocates) might lead us to believe. As Wittgenstein muses in \textit{Philosophical Investigations},\textsuperscript{11} ‘is it even always an advantage to replace an indistinct picture with a sharp one? Isn’t the indistinct one often exactly what we need?’ This paper proceeds in a Wittgensteinian spirit in its understanding of what might fall within the meaning of the term ‘the history of international law’. The principle reason for proceeding in this spirit is to allow us a more capacious vista on many ways in which inquiries into an historical past have developed over the last 30 years, in respect of the international and its law-connected objects and subjects. We are interested in grasping the diverse problems and preoccupations which have prompted these inquiries, and the family resemblances (the complicated network of similarities) which may characterize these problems and preoccupations—and the diverse modes and methods of inquiring into some part of the historical past that can be discerned from these inquiries.

The flourishing of historical and historiographical inquiries in relation to international law has been repeatedly noted since the first decade of the 21\textsuperscript{st} century.\textsuperscript{12} There is much ‘turn talk’\textsuperscript{13} in the notice taken of this trend, although it is not immediately clear whether we are all talking about the same turn, or an unruly concatenation of overlapping disciplinary turns (some, outward from national spaces to the extranational, and others, relocalizing or redomesticating the seemingly global


or universal, others still revisiting methodological presumptions and notions of source material).\(^{14}\)

The academic discipline of history has undergone multiple *methodenstreit* associated with a variety of ‘turns’—social, linguistic, cultural, transnational, and global—since 1945. Dipesh Chakrabarty,\(^{15}\) an astute observer of the discipline, points out that the 20\(^{th}\) century discipline of history has both a cloistered and a public life. The cloistered life ‘lives through journals, reviews, specialized conferences, university departments, professional associations and so on … It is what gives a discipline its social and institutional authority, making people look on practitioners of the discipline as experts’. The cloistered life of history, its field-like\(^{16}\) quality as a distinct, differentiated space of knowledge production and of generation of claims of knowledge through (mutable) specialized methods, seeks to ‘instill a version of knowledge for which the protocols of knowledge are designed to ensure veracity in the judgment of the practitioners of the discipline’.\(^{17}\)

But history—to a lesser extent even than law—has relatively few barriers to entry, except in some specialized fields: ‘generally speaking, history is probably the least technical of all social science disciplines’. As such, almost any person (academically trained or not, trained in history or not) can ‘presume to write and debate history’.\(^{18}\) Historical claims exchanged beyond the academy are closely tied to rhetorics, political and otherwise, such that ‘historical writings end up being embedded in different public contexts in very different ways’.\(^{19}\) One need only recall the ways in which the histories of 19\(^{th}\) century (British) empire were mobilized against and for the invasion of Iraq in 2003\(^{20}\)

\(^{14}\) This is a point to which I will return further below.


\(^{17}\) Chakrabarty, *The Calling of History*, 7

\(^{18}\) Ibid.

\(^{19}\) Ibid 8.

or the diverse stories we told ourselves about the origins of the Euro debt crises of 2010 to 2016.  
Historical narratives and claims populate our social imaginaries, embed concepts and schema of thought and action, and articulate a variety of possible understandings of how we came to be where we are, and why. Historical claim-making is common to myth, ideology, and critique. Chakrabarty suggests that these public lives of history also exert influence on the basic categories of its cloistered life, “research”, “facts”, “truth”, “evidence”, “archives”—can be molded by the interaction between history’s cloistered and public lives’.  

There is nonetheless a deep and pervasive sense within students of international law, that our self-conscious preoccupation with our relationship to the past, has been both intensified and deepened in ways markedly different than several previous generations. As crude (and mostly English-centric) proxies for this flourishing of interest in the historical past of the international and its law-connected subjects and objects, we can observe the growth of the Oxford Series in the History and Theory of International Law—founded in 2013, it has, at the time of writing, 28 volumes in print or imminently forthcoming, with authors’ disciplinary affiliations ranging from law, to history, to political theory. Cambridge University Press’s Monographs in International and Comparative Law has published 14 volumes since 2016 that are historical inquiries in some way or another. Brill’s series of Studies in the History of International Law has since 2011 published 23

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24 Nehal Bhuta, Anthony Pagden and Benjamin Straumann, General Editors.

25 Larissa Van den Herik and Jean D’Aspremont, General Editors
and the *Studien zur Geschichte des Völkerrechts*, founded by the late Michael Stolleis, has published 40 volumes since 2007. These observations are but straws in the wind, not representative samples. In book series and journals devoted to political thought and international relations, and to international, regional, and global history, can be found inquiries into global (imperial, colonial, international) legal discourses and arguments, origins of international legal institutions, and social-political ideals, movement, and objectives (such as humanitarianism, development, interventionism, arbitration, self-determination) which are closely interlaced with spaces and agents constructed by international legal discourses. An exhaustive census is likely to be, well, exhausting, and quickly superseded.

B. Varieties of Presentism: Decisionism, Historicism and the Birth of *European Legal History*

Nietzsche complained (writing as he was at the apex and early decline of German historicism) of the ‘consuming fever of history’ that surrounded him. Historical knowledge, he lamented, ‘streams in unceasingly from inexhaustible wells, the strange and incoherent forces its way forward, memory opens all its gates and yet is not open wide enough … Modern man [sic] drags around with him a huge quantity of indigestible stones of knowledge, which then, as in the fairy tale, can sometimes be heard rumbling about inside him’. Nietzsche worried that this ‘oversaturation’ of historical consciousness would paralyze us with cynicism, or equally dangerously, lead us to a fantasy of our

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26 Randall Lesaffer, General Editor.
27 Anne Peters, Bardo Fassbender, Milos Vec, and Jochen von Bernstorff, General Editors
30 Ibid 78.
own progress—that we possess ‘the rarest virtue, justice, in a higher degree than any other time’.\textsuperscript{31}

The problem of our relationship to history was in some sense the problem that, the more we know about the past, the more alien and remote—and thus less useful—it is to our actions in the present. The utility of the past requires, for Nietzsche, a kind of decisionism in which we choose a vitalist mode of being in which history can be consigned to a proper role: as storehouse of tradition, or as exemplary monuments of greatness or folly, or as relentless, dissolutive, genealogical objectivity. The third of these is in some sense the most modern historical consciousness, but also the one that troubles Nietzsche the most, because ‘Objectivity and Justice have nothing to do with each other’\textsuperscript{32}. The unsparing historical inquiry of this kind, ‘uproots the future because it destroys illusions and robs the things that exist of the atmosphere in which alone they can live. Historical justice, when it is genuine and practised with the purest of intentions, is therefore a dreadful virtue … Its judgment is always annihilating’.\textsuperscript{33} Nietzsche’s ultimate answer is to seek a mode of unhistoricallity in the way we relate to the historical past, as we are ineluctably future-oriented beings who must live for tomorrow, not yesterday: ‘the antidote to the historical is called—\textit{the unhistorical and the superhistorical}\textsuperscript{34}. The unhistorical is ‘the power of \textit{forgetting} and of enclosing oneself within a bounded \textit{horizon}’ while the superhistorical refers to the powers which ‘leads the eye away from becoming towards’ belief systems ‘which bestow upon existence the character of the eternal and stable’.\textsuperscript{35} Exemplary belief systems of this kind, for Nietzsche, were art and religion, rather than history and science.

Nietzsche’s reflections dramatize the stakes of all this historical inquiry, and perhaps shed some light on why we might be so exercised about the inflation and diffusion of the interest in the

\textsuperscript{31} Ibid 83.  
\textsuperscript{32} Ibid 91.  
\textsuperscript{33} Ibid 95.  
\textsuperscript{34} Ibid 95.  
\textsuperscript{35} Ibid 120.
pasts of international law-related objects and subjects. Historical inquiry is ‘eternally youthful’\(^{36}\) and ‘forever being rewritten’\(^ {37}\) precisely because its modal relationship with our future-oriented present action-horizon can be very pronounced. One possible modality of our relationship to the past is what Oakeshott called the practical past\(^{38}\)—the past is looked back upon as a storehouse of ‘message-bearing survivals’ (objects, performances such as texts, images, and exemplars of human conduct etc) which may ‘may be said to afford us a current vocabulary of self-understanding and self-expression … [this storehouse of the past may] have been made to yield important conclusions about ourselves and our current circumstances; [for example] that it is a past which displays a “progressive” movement to which our own times belong; that it exhibits a darkness to which our own enlightenment is a gratifying contrast; that it tells a story of decline and retrogression of which we are the unfortunate heirs’.\(^{39}\) Oakeshott argues that this modality of relating to the past—these practical pasts—are concerned principally with constructing a 'symbolic vocabulary of practical discourse',\(^{40}\) a product of ‘practical imagination’ that relates to the past insofar as that past has a currency in relation to the time and circumstances in which this vocabulary of practical discourse is deployed.

Koskenniemi expresses some preference for this modality of our relation to the past as a practical past, when he contends that ‘historians of international law must accept that the validity of our histories lies not in their correspondence with ‘facts’ or ‘coherence’ with what we otherwise know about a ‘context,’ but how they contribute to emancipation today’.\(^{41}\) These practical pasts are


\(^{37}\) Koselleck, Sediments of Time, 113.

\(^{38}\) Oakeshott, Three Essays, 23. Oakeshott’s debt to Heidegger is considerable, and he has this in common with Koselleck and Chakrabarty.

\(^{39}\) Oakeshott, Three Essays, 23.

\(^{40}\) Oakeshott, Three Essays, 43.

\(^{41}\) Martti Koskenniemi, 'Vitoria and Us', Rechtsgeschichte Rg, 22 (2014) 119-138, at 129, my emphasis.
indispensable to our future-oriented action; the seeming urgency of articulating and constituting them in our now-time is engendered by an ineluctable sense that our present is always already a space of possible futures inherited from the past: ‘A human being simply cannot avoid being oriented toward the future. Yet the fact of having been there already—what Heidegger calls “I am as having been”—is also beyond the control of the human. All our pasts are therefore futural in orientation. They help us make the unavoidable journey into the future’. Koskenniemi’s injunction that the validity of the results of our historical inquiries lies in the contribution to emancipation now instantiates what Chakrabarty calls decisionism as a relationship to the past. Decisionism presents itself as a critical alternative to a certain kind of historicism (of which more later) in as much as the critic purports to relate to the future and the past

as though there were concrete, value laden choices or decisions to be made with regard to both. The critic is guided by his or her values to choose the most desirable, sane, and wise future for humanity, and looks to the past as a warehouse of resources on which to draw as needed. This relationship to the past incorporates the revolutionary-modernist position in which the reformer seeks to bring (a particular) history to nullity in order to build up society from scratch.

The uses of the past are guided by a critique of the present, but Chakrabarty points out that both decisionism and historicism are invested in a modernist dream of a true present: a present disclosed either as the outcome of a ‘not yet’ or unrealized actual unfolding from the past, or a present from which we can self-consciously reconstitute our relationship to the past (‘the validity of our histories depends …’) in a way that discloses the path towards a desired future. Decisionism of this kind naturally carries some risks (as historicism does, of a different kind). Oakeshott points out that one predictable consequence of an intensively practical relationship to our past, of the decisionist variety, is that such a past is

valued in respect of the support it may give to what is recognized to be a desirable present of practical engagements, and when it is found to be valuable we say that ‘history is on our side.’ But it may contain items which are not only worthless but recognized to be positively injurious and therefore proper to be forgotten or even proscribed. The removal, for example, of the name of Trotsky from the official Bolshevik emblematic past or that of the explorer Stanley from the practical past of Zaire was part of an undertaking to construct a symbolic vocabulary of practical discourse which would not prejudice an approved practical present.43

Both decisionism and historicism are varieties of presentism, and in this sense we must agree with Koselleck that ‘Every history is Zeitgeschichte and every history was, is and will be a history of the present’.44 At some level, ‘presentism’ requires no defence, although many seem preoccupied with defending it.45 But what does ‘presentism’ mean here? It need not be an epithet so much as a recognition of a condition for the starting point of an inquiry into a historical past: ‘No science can escape from the conditions imposed by the constitution of the thinking mind which gives it birth … We always, either voluntarily or involuntarily, relate the course of past events to the complex effects which lies before us in the present […] and […] we are constantly drawing either special or general conclusions from the past and making use of them in our task of shaping the present with a view to the future’.46 For Weber, as for Troeltsch, where no relation to the present can be found, we are in the realm of antiquarianism or ‘work for work’s sake’. Our sense of what matters in our present is a reflex of our own horizon of meaning and action now—our ‘encounter with life in its immediate aspect’, endowed as it is by ‘an absolute infinite multiplicity of events “within” and “outside” ourselves, [events that] emerge and fade away successively and concurrently’.47 What seems significant in our past (itself, an infinite sequence of events leading into our present moment)

43 Oakeshott, Three Essays, 43.
44 Koselleck, Sediments of Time, 103.
is an ascription of value, a judgment which selects what finite part of the infinite stream of
antecedent events is ‘important’ or ‘worth knowing about’. This ascription of value is itself subject
to the

immeasurable stream of events [flowing] unending towards eternity. The cultural
problems that move humankind constantly assume new forms and colourings; within
that ever-infinite stream of individual events, the boundaries of the area that acquires
meaning and significance for us … therefore remain fluid. The intellectual
framework within which it is considered and scientifically comprehended shifts over
time; thus, the points of departure of the cultural sciences [such as history] remain subject to
change in the limitless future…

Weber’s argument that only a ‘hair-thin line’ separated the sciences of culture from
subjective belief reflected not only his debt to Nietzsche. It was also part of a wider milieu, the
critique and crisis of historicism, in the sense of that preponderantly German style of historical
thought that accompanied the rise and institutionalization of an academic discipline of history in 19th
century Europe. The problemstellung of historicism was both the problem of meaning in history
(Historicism 1) and the problem of the meaning of history (Historicism 2). Answers to these
problems did not always coincide, but sometimes did, especially in 19th century theories of historical

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48 Ibid 114.
49 Ibid 121.
50 Ibid 121.
54 History was a particularly German academic endeavor in the 19th century. See Bloxham, *Why History?,* 192-245; Ghosh, *Max Weber and the Protestant Ethic*, 104-105: In 1810, Germany had 5 chairs of history; in 1870, 56 chairs, and in 1910.
55 Kelley, *Faces of History*, 265-269. Funkenstein, *Theology*, 206-210. Samuel Moyn puts the relation between these 2 versions of historicism deftly: ‘Where the one definition fastens on the particularity of every historical moment and separates it from all the rest, the alternative definition binds each historical moment to every other so that they combine to add up to a complete master-script of time.’ Samuel Moyn, ‘Amos Funkenstein on the Theological Origins of Historicism’ *Journal of the History of Ideas* (64(4) (2004) 639-657, at 642.
development. Funkenstein, a sure-footed guide in this treacherous terrain, notes that ‘the many versions of reason in history from Vico to Marx are only speculative byproducts of a profound revolution in historical thought in the sixteenth and seventeenth centuries, namely the discovery of history as contextual reasoning’. Uniting Renaissance legal humanism’s attempt to discern the meaning of Roman laws in their original late-antique contexts, and early modern political thought’s abiding preoccupation with the ‘barbarian origins’ of civil morality in stadial histories of the development of political society and civil peace, what I have called Historicism 2 and Historicism 1 combined ‘invisible hand’ interpretations of history and the new, contextual reasoning in history—a macronarrative philosophical history denoting ‘both the condition at which history was arriving and the state of mind in which it should be written and understood’. Common to both Historicism 1 and Historicism 2, was the sense of ‘immanent structures that have to be unearthed. Historical sources reveal their information indirectly … The “spirit of the people”, the “genius of the times”

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57 Ibid 209: “Ever since the sixteenth century, philologists, jurists, and biblical critics had developed methods of understanding through alienation and reconstruction: they severed past monuments, institutions, events from their actual connotation and association, and interpreted them in light of their remote original setting as if they were details of a strange new continent.” Kelley, *Faces of History*, chapter 8; John G.A. Pocock, *Barbarism and Religion: Narratives of Civil Government* (Cambridge: Cambridge University Press 1999, Vol 2) 16: ‘It was through philology thus operating that ‘history’ acquired the meaning it never had before, and has not lost since: that of an archaeology of past states of society, reconstructed by reconstituting the language in which their texts were written.’


60 Pocock, *Barbarism and Religion: Volume 2*, 21. See also Friedrich Meinecke, *Historism: The Rise of a New Historical Outlook* (1936, text of 1958, transl. John E. Anderson, New York: Herder and Herder 1972) Ivii: ‘[Historism] was a stage in the development of Western thought. For there is an intimate connection between evolutionary and individualizing thought-forms. It belongs to the essence of individuality … that it is revealed only by a process of development. … The idea of development superseded the method of dealing with historical changes prevailing hitherto … [which] treated history as a useful collection of examples for pedagogical purposes, and explained historical changes in terms of superficial causes, either of a personal or a material kind.’
does not announce itself in the sources; it has to be reconstructed from them’. The longer theological—principally, Judaic and Christian—lineages of Historicism 2 (qua eschatology and redemption) were traced by Funkenstein, in a complex renovation and extension of Löwith’s argument. Historicism 1 and Historicism 2 are both presentist: Historicism 1 reconstructs the meaning of texts and events in their past context, but ‘the reconstruction is always linked to [the historian’s] “point of view” in the present’. Historicism 2 takes a path discerned in history’s determinations of the now, as the path towards ‘a future fulfilment’—a cryptic promissory note immanent in the now, deciphered by historians who can locate our present within this singular temporality.

When Chakrabarty writes that ‘historicism enabled European domination of the world in the nineteenth century’, it is Historicism 2 that he denotes. Historicism 2, then, was one important form that the ideology of progress or ‘development’ took from the nineteenth century on. Historicism is what made modernity or capitalism look not simply global but rather as something that became global over time, by originating in one place (Europe) and then spreading outside it. …

It was one important form that the ideology of progress or ‘development’ took from the nineteenth century on. … This ‘first in Europe, then elsewhere’ structure of global historical time was historicist… Historicism thus posited historical time as a measure of the cultural distance (at least in institutional development) that was assumed to exist between the West and the non-West. In the colonies, it legitimated the idea of civilization. In Europe itself, it made possible completely internalist histories of Europe in which Europe was described as the site of the first occurrence of capitalism, modernity, or Enlightenment.

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66 Ibid 7-8.
This historicism, and ‘perhaps even the modern European idea of history’, became Europe’s way of saying ‘not yet’ to non-European peoples.\textsuperscript{67} But it was also intractably related to what Koselleck famously called the Neuzeit of modernity, a horizon of expectation in which time is homogenous and ‘constantly outpacing itself’ on its way to a better future—whether reformist, liberal, or revolutionary-utopian.\textsuperscript{68} The phrase ‘progress of history’ is first employed after 1800,\textsuperscript{69} reflecting an epochal reckoning with the accelerated change unleashed by the French Revolution and its yet-to-be-realized utopian possibilities.\textsuperscript{70} Koselleck notes that ‘all intellectuals born [in the footsteps of Herder and Kant], idealists or romantics, designed philosophies of history in order to redeem the achievements of the French Revolution as an initial pledge toward a rational future … All of these philosophical-historical interpretations went out of their way to conceive of the present day as a necessarily transitional phase on the way to a better future … History was an agent of higher necessity that could redeem these different hopes and desires’.\textsuperscript{71} Historicism and modernity were born twins.

Napoleon’s invasions and his ensuing Codes inescapably posed the question of the relationship between the progress of history and law—and so provoked in many ways the 19\textsuperscript{th} century discipline of (European) national legal history itself.\textsuperscript{72} In what sense could binding legal authority be a pure legislative act of (changeable) popular-sovereign will, and not a concrete

\textsuperscript{67} Ibid 8.
\textsuperscript{68} Koselleck, \textit{Sediments of Time}, 90.
\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid 96-7. Löwith similarly observes that ‘the French Revolution, with its destruction of tradition, had a historicizing effect upon the consciousness of contemporaries. Thenceforth, the time of the present … views itself expressly as belonging to the course of history, looking toward the future.’ Karl Löwith, \textit{From Hegel to Nietzsche: The Revolution in Nineteenth Century Thought} (text of 1941, New York: Holt, Rinehart & Wilson 1964) 202.
expression of the already-constituted customs, history, and life of a nation and its peoples? One historicist answer to this question was that the will of the people was itself reason-in-history, and it was history that had been the medium for the actualization of reason through Revolution and Bonapartist rule: Hegel’s famous figure of Napoleon as the soul of the world on horseback.73 Another historicist answer, given by von Savigny, was that the true foundation of authoritative law lay in the customs which expressed the historical spirit and substance of a concrete people.74

C. What Was the History of International Law?

While histories of legal acts, court histories of sovereign agreements and correspondence,75 and treatises collecting legal usages and documents, were produced with regularity—usually by European jurists and diplomats —through the 18th century,76 and began (in the form of Universal Histories) to show some evidence of the impact of rising tide of stadial histories of European civilization that sought to elucidate the conditions for the overcoming of ‘barbarism and religion’ within Europe, there is a crucial sense in which the history of international law—and many of the characteristics we attribute to it—is a product of 19th century historical jurisprudence and its historicisms.

It is widely observed by (European) legal historians, that theirs is a discipline born of the 19th century,77 distinguishable from other versions of ‘what history was’ in the preceding 200 hundred

73 ‘I saw the Emperor – that soul of world-wide significance – riding on a parade through the city. It is indeed a wonderful sensation to see such an individual, who here, concentrated at one point, sitting upon a horse, encompasses the world and rules it.’ Hegel’s letter cited in Löwith, From Hegel to Nietzsche, 215.
76 See the examples given by Dhondt and Lesaffer in this volume [reference to be added when volume finalized].
years. Cairns points out that the first specialist periodical devoted to legal history was the *Zeitschrift für geschichtliche Rechtswissenschaft* (1815-1848), produced by von Savigny, Eichorn, and Göschen, and that ‘it is possible to trace the impact of the German Historical School’ through much of Europe, and that after World War Two, ‘Koschaker and Wicacker both identified the development of legal history into a discipline with the rise of the Historical School of Law in Germany’. Duve also echoes this judgment in a long retrospect on the discipline of legal history in Germany: ‘[I]n the late 19th and throughout much of the 20th century, the German concept of Legal History served as a model in many places across the globe …’ National legal history in Europe inhaled deeply of the historicist atmosphere of 19th century German historical thought, producing in particular a rich vein of speculation concerned with establishing the relationship between, on the one side, law and the *particular historical manifestation* of a people and its culture, and on the other, between this organic connection of people and law and a more *universal concept* of culture and civilization. This *historical jurisprudence*—indebted to Savigny but also over time absorbing the *philosophical* historicism of

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81 Duve, ‘German Legal History’, 31-32. In ‘Global Legal History’, Duve observes that *European legal history* as a distinct and autonomous field (premised “on a cultural unity demarcated sharply from others and largely contiguous with a geographic territory in the centre of which Europe is located”) is a product of the post 1945 period, but even here an indebtedness to the program of the German Historical School and its academic practices, was strong. Thomas Duve, ‘Global Legal History: Setting Europe in Perspective’ in Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press 2018) 116-140, at 125, 128. My thanks to Thomas Duve for helping me sharpen the distinction between 19th century legal history as practised in Western European national legal historiography – and shaped foundationally by the German historical school – and European legal history. 

Hegel—understood law was not only a product of history and its progress, but also a medium for such progression and evolution; in a century in which Europe’s domination and exploitation of the globe achieved its apotheosis, it was surely no accident that ‘the superiority of Western law and organization and the telos of progress’ were the ‘leitmotifs’ of 19th century historical jurisprudence: ‘explaining the special development and dominance of the West (including the special nature of Western law) had been a preoccupation … and there was a tendency to describe certain products or features of European social organization (such as the rule of law, property rights, limited governments and so on) as the key factors in human history’. Developmental and evolutionary models of progress in history had a special affinity with accounts of legal development towards a

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84 As Osterhammel puts it, ‘No other century was even nearly as much Europe’s century … Never before had the western peninsula of Eurasia ruled and exploited larger areas of the globe. Never had changes originating in Europe achieved such impact on the rest of the world … The nineteenth century was a European one also in the sense that other continents took Europe as their yardstick. Europe’s hold over them was threefold: it had power, which it often deployed with ruthlessness and violence; it had influence, which it knew how to spread through countless channels of capitalist expansion; and it had the force of example, against which even many of its victims did not balk. … The history of the nineteenth century was made in and by Europe, to an extent that cannot be said of either the eighteenth or twentieth century, not to speak of earlier periods.’ Jürgen Osterhammel, The Transformation of the World: A Global History of the Nineteenth Century (transl. Patrick Camiller, Princeton: Princeton University Press 2014) xx.

It is important to register, however, that European legal history’s self-valorizing narration of Europe’s world historical mission, was by no means frictionlessly received and assimilated by those subjected to its force: See Liliana Obregon, ‘Peripheral Histories of International Law’, Annual Review of Law and Social Sciences, 15(1) (2019) 437-451.

more perfect realization of the reason inherent in law’s concepts. The impact of ‘the great systems of
German idealism’ here is evident:

The new and common element of this [German] idealist position lies in consistent and systematic temporalization. Justice, whatever it might be, is realized in and through the entirety of world history. In their relation to world history, humans are always given over to structures of ‘already’ and ‘not yet’ and these structures force them to realize justice … This also makes it possible to conceive of history in its diachronicity as a path towards the rule of law, toward a league of nations, and to act accordingly.

It is no longer the individual history that displays a justice inherent in it; instead, as an open-ended totality, world history is subject to the rational necessity of progressively transforming the human expression of power into legally secured and, even more important, just conditions.87

European historical jurisprudence—and the national legal historiographies it inspired—was a philosophical history, which later took a sociological turn.88 It began swimming against a certain stream of Enlightenment universal history (of the philosophes and the statist Aufklärer),89 but ultimately made its home within the oceanic currents and slip-streams of 19th century historicism in both of the senses outlined above: it inquired intensively into the contextual meaning and authority of law in historical contexts, and also did not refrain from arranging these contexts into a sweeping universal temporality of human progress in history.

‘The history of international law’, then, is a short-hand expression for that branch of European historical jurisprudence that expressly concerned itself with what we might today call the

87 Koselleck, Sediments of Time, 125-126.
89 On this opposition, see Kelley, Faces of History, 268 and Martti Koskenniemi, To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1370-1870 (Cambridge: Cambridge University Press 2021), chapter 12.
'globalization’ of European law and jus publicum Europaeum, as an emanation, bearer, and agent of historical progress. It was a multi-faceted enterprise, as contributions to this volume show, taking on distinct complexions and preoccupations in different European national contexts. Multi-volumed surveys of European legal acts and practices, such as Heeren’s *History of the European System of States and its Colonies* (1809), Ward’s *Enquiry into the Foundation and History of the Law of Nations in Europe* (1795), and Martens’ *Recueil des traités* (1791) and *Précis du droit des gens modernes de l’Europe* (1789, 1821) reflect the continuing influence of 18th century universal histories and their concern to identify a *Europäisches Völkerrecht* through a survey of the entire European legal landscape—taking the latter as empirical evidence of the actualization of universal natural law tenets that subtended the European state and its necessity. But the proto-historicism of 18th century German natural law (which Meinecke aptly summarized as treating ‘history as a useful collection of examples for pedagogical purposes’) gave way to more ambitious histories that reflected the formative power of historicist thought on the imagined world-historical role of European laws and customs as the path towards a universal legal civilization. The close compatibility with theories and practices of racial hierarchy, as well as taxonomies of civilization and barbarism, requires no elaboration and can be easily observed in the late 19th century’s international law histories. The latter period appears to have been one in which the nature of the *European historical jurisprudence* of international law as the overripe fruit of

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90 Chapters in this volume by Dhondt, Lesaffer and Armitage and del Rasilla (reference to be finalized once volume is finalized).
91 By far the best treatment of this to date is Koskenniemi, *To the Uttermost Parts of the Earth*, chapters 11 and 12.
what I have termed ‘Historicism 2’ is much in evidence, and countless examples can be gathered of its logics of exclusion and inclusion revolving around European archetypes of social, political, and legal organization.95

The late 19th century formation of a distinctive disciplinary field—and associated professional *habitus*—of international law has increasingly become a commonplace in how we understand the ‘birth of the discipline’.96 One of the insights of the last two decades of renewed historical inquiry into the disciplinary field of international has been a recovery of the extent to which it leaned heavily on an understanding of its own historical character within an historicist philosophical history.97 Craven incisively summarizes this close connection between the discipline’s formation, and its ‘consciousness of its own historical character’:98

Whereas before, the non-European world could be perceived as an undifferentiated terrain—as the incidental locus of legal thought and action—it became the spatial exemplar of the new temporal ordering of international law. The process by which international law came to be understood as historically located was one that resulted in a divided realm of doctrine and practice in which those parts of the world that partook of that history were divided from those that had yet to participate in it. The redescription of the *ius inter gentes* as the public law of Europe appeared, thus, to be the merest logical expression of this anthropologically-informed historical consciousness.99

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97 Matthew Craven has consistently emphasized this: see Matthew Craven, ‘Theorizing the Turn to History in International Law’ in Anne Orford and Florian Hoffman (eds.), *The Handbook of the Theory of International Law* (Oxford: Oxford University Press 2016) 22-37.

98 Craven, ‘The Invention of a Tradition’.

99 Ibid 367.
The waiting room of history had found its global legal carapace, and surveys of histories of international law demonstrate the broad continuity—with some political and methodological variations—of these European modes of historical thinking and writing from the mid 19th century through to the early 20th.\textsuperscript{100} The field of international law and its historicisms emerged from within an interconnected pan-European legal elite at the end of the 19th century. The projects pursued by these elites were diverse, from national unification to the recasting of republican and liberal political ideals, but they converged around the law and practice of late 19th century colonialism and the common problematic of peace and order in Europe (two different, but closely linked, projects of civilization).\textsuperscript{101}

The historicism (in the sense of Historicism 2) of European historical jurisprudence shared, to an extent, in the wider epistemological and intellectual crisis that afflicted the atmosphere of historicist thought in the late 19th century. The consequence of a rigorous approach to the social and historical production of value and meaning in history was to raise squarely the problem of the relativity of values and meaning across historical periods, and to challenge any naïve assumptions about the relationship between conceptual and ideational schemes constructed by the sciences of culture and civilization, and the concrete reality of historical change.\textsuperscript{102} Weber, among others,\textsuperscript{103}


\textsuperscript{101} The locus classicus of this story: Koskenniemi, \textit{The Gentle Civilizer}.

\textsuperscript{102} See Oakes, \textit{Weber and Rückert}, chapter 1. Megill, ‘Why was there a crisis of historicism?’, 416: ‘The crisis of historicism can be briefly defined as the concern … with the allegedly damaging effects of an excessive preoccupation with the methods and objects of historical research. Two such effects were customarily emphasized, namely, a relativism destructive of absolute (or at least prevailing) values, and a focus on the past destructive of commitment to the tasks of the present.’

raised severe doubts against the historicist premise that a science of culture could reproduce reality, and also against the (social scientific) positivist axiom that a system of abstract general laws could map its features. At stake in this crisis-critique of European historicism was not necessarily any concern for those people and places relegated to history’s waiting room. Rather, it was a looming confrontation with the practical, ethical, intellectual, and political consequences of Europe’s 19th-century transformation—which we habitually gloss as modernity, so poignantly captured in Marx and Engels’ poetic dictum: ‘All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life and his relations with his kind’. Pace Marx and Engels’ mid-19th century mix of historicism and positivism, however, neither history nor scientific laws of social reality, provided comprehensive meanings or values with which to encounter our real conditions of life. History no longer appeared a stable source of meaning or justification for present values, morals, or institutions, or to allow us to divine how we should act towards the emergent future: ‘a crisis was faced, rather than caused, by a conception of history that (as late as 1900 …) served as a worldview by providing moral meaning … It was the growing insight that … “motivations for actions” and “orientations on the future” could no longer be unproblematically derived from the past’. Providence and progress were no longer subtended by the lessons of history and no historical Begründung for our most cherished ideals could be discovered in these lessons. Indeed, history seemed to be revealed as ‘infinite and potentially unmasterable … [a] voluminous and implicitly relativistic chaos, a state of affairs laid bare (or created) by a century or

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106 Here we should note Foucault’s provocative observation: ‘Marxism exists in 19th century thought like a fish in water: that is, it is unable to breath anywhere else.’ Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Vintage 1994) 261.
more of academic enquiry into the remote past’. The perceived anarchy of values within societies undergoing rapid change—population growth, urbanization, industrialization, the rise of mass parties on the left and right—engendered a steady stream of discourses of anxiety and civilizational decline from the turn of the century, accelerated by the unprecedentedly destructive conflict of World War I.

The consequences of this Zeitgeist for European historical jurisprudence and the history of international law as its subfield, do not appear to have been systematically examined. But we can observe from the beginning of the 20th century a decline in a self-consciously historicist and historicizing academic writing in international law; this is sometimes labelled the rise of a positivist science of international law—in contrast to a supposed naturalism—but it is important to note that the late 19th century projects for the codification and ‘scientization’ of international law did not repudiate historicism and civilizational discourses so much as thoroughly metabolize them, iceberg-like, into a submerged mass of which only certain rule-like emanations were sharply visible.

International law derived its objective rule-like character not exclusively from the subjective will of states, but from its foundation in ‘a common legal consciousness that at the same time referred to a deeper dimension. It was a moral and religious one, historically founded and shared in the western world’. Oppenheim’s lectures on the Future of International Law, as well as the first edition of his

108 Ghosh, Max Weber and the Protestant Ethic, 388.
111 See Nuzzo, Lawyers, Space and Subjects.
112 Ibid 66.

The inter-war period yielded what Bloxham has called a ‘neo-historicism’\footnote{Bloxham, *Why History?*, chapter 5.}—stripped of optimistic expectations of progress and providence, but nonetheless highly ‘civilizational’ in their framing of the contexts of genesis of social, legal, and economic order in history.\footnote{E.g., Oswald Spengler, *The Decline of the West* (1918, transl. Stuart H. Hughes, Oxford: Oxford University Press 1991): Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (2nd edn., Oxford: Berg 1993).} The crises of liberalism—whether national or imperial—yielded a range of competing visions to justify the authority and validity of the state and its internal and external public laws. The legacy of the crisis of historicism’s providential unification of the ‘already’ and the ‘not yet’ in the temporal unfolding of justice, was a deepening divide between a historically- and sociological-minded realism concerning the foundations of legal and political order (in which the historically-determined substance of the political was in some basic sense the truth of law),\footnote{E.g., Otto Hintze, Felix Gilbert, Hermann Heller, Hermann Kantorowicz, Otto Brunner, Carl Schmitt, John H. Herz, Ernst Kantorowicz and Hans J. Morgenthau.} and neo-Kantian and rule-positivist approaches that embedded a weak providentialism in the workings of legal forms and legal institutions—as means of mitigating conflict and of crystallizing the incipient order-possibilities arising from greater
economic and social independence.118 There was also an adjacent interest in looking for the order-giving possibilities of law beyond or below the state through other forms of human association.119 Neither history nor nature seemed to assure stable foundations for human societies and their development, leaving law oscillating between organicism and decisionism, or some combination of both.

By 1945, Europe was in ruins: the second World War had seen ‘the full force of the modern European state … mobilized for the first time, for the primary purpose of conquering and exploiting other Europeans’120 rather than the non-European world. Thirty-six and a half million Europeans died from war-related causes between 1939 and 1945,121 and a further unprecedented destruction of capital stock, city scapes, agricultural land, and livestock. The puzzle could be posed as it was by Judith Shklar: ‘It is not only that no reasonable person can today believe in any “law” of progress … Rather than look to the future at all, we tend to turn backward and ask ourselves how and why European civilization reached its present deplorable condition’.122 Arendt similarly concluded in 1951, that ‘there prevails an ill-defined, general agreement that the essential structure of all civilizations is at the breaking point’ especially ideas of historical progress.123 Historical thinking migrated to the new

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121 Ibid 17.
discipline of international relations and its self-declared ‘realists’ (sometimes lapsed international lawyers themselves), with their decidedly anti-utopian and tragic sense of history as a foul rag and bone shop.\textsuperscript{124} Within international law, stories of progressive historical development tended to become institutional origin-stories of lessons-learned from past errors,\textsuperscript{125} while the historical work on international law appears to have shrunk to a small sub-specialization of legal history undertaken within European law faculties.\textsuperscript{126} Indeed, the very point of writing the history of international law becomes unclear at this juncture: no strong civilizational providence could be claimed to inhere in a European culture and history any longer; instead, a weak providentialism might be faintly discerned in speculative surveys of ancient rules and practices, medieval institutions, and other sought-for exemplars of a vestigial ‘universal history’ of legal rules and practices.\textsuperscript{127}

Within textbooks and other manuals, history was relegated to a brief rehearsal of tidbits from the 17th to 19th centuries, a historical woodshed to be raided for the occasional salutary example of how peace and order could be achieved.\textsuperscript{128} By the time German Jewish émigré and private law scholar Arthur Nussbaum published his \textit{Concise History of the Law of Nations} in 1947,\textsuperscript{129} his

\textsuperscript{124} See Nicolas Guilhot, \textit{After the Enlightenment: Political Realism and International Relations in the Mid-Twentieth Century} (Cambridge: Cambridge University Press 2017) – notable figures being Morgenthau and Herz but also former students of Meinecke such as Gilbert. The historical character of international relations thought was itself only 2 decades-long, replaced by a species of rationalism – see Guilhot, \textit{After the Enlightenment} and Sonja M. Amadae, \textit{Prisoners of Reason: Game Theory and Neoliberal Political Economy} (Cambridge: Cambridge University Press 2015).


lapidary contention was simply that ‘the history of the law of nations is conterminous with the
documentary history of mankind’.\textsuperscript{130} The origins of 19\textsuperscript{th} and 20\textsuperscript{th} century international law remain, in
this telling, European, and—apart from an inquiry into some ancient civilizations—the cast of
characters playing their parts in the development of international law remain preponderantly coeval
with Western European political and legal canons, punctuated by some institutional developments
such as arbitration and adjudication. The 19\textsuperscript{th} century is singled out for its role in the making of
modern international law, but no mention is made of its formative relationship with colonialism or
its civilizational vision of a hierarchically arranged world of races and politics. The history of
international law was to be an admixture of chronologically-arranged doctrines, political and legal
ideas, diplomatic event-history, and founding fathers to whom lesser or greater roles can be
attributed; the terminus ad quem was Nussbaum’s present, where the tragedies of the past are
assimilated to a cautious hope of progress in the co-operation of nations under international law:
‘Humanity seems headed in the long-run toward a more perfect state of international law. The
present generation’s keen awareness of the imperfections of the law of nations itself is a propitious
sign’.\textsuperscript{131} In contrast with the intense historicism of legal history of a mere 25 years before—a
 historicism fraught with disputes about the meaning of progress in history, as well as profound
contention about the nature and direction of legal change in history, Nussbaum’s history of
international law was aloof and irenic, entering into a contentious spirit only in relation to the
relative significance of the Scholastics. The temporal unfolding of legally secured relations, to
paraphrase Koselleck, remained in some sense the indispensable presupposition of the idea of
international law, whatever the charnel house of history itself might prove. The reception of
Nussbaum’s book, strikingly, essentially confirmed this anodyne understanding of what the history

\textsuperscript{130} Nussbaum, \textit{A Concise History}, 2.
\textsuperscript{131} Ibid 3.
of international law amounted to—Wright criticized his light treatment of antiquity and the middle
ages,132 Sereni took him to task for his approach to certain doctrines and themes,133 and Northrop
complained that he failed to appreciate the true contribution of Roman law to universality134—but
no one questioned the basic point of the exercise. International law’s history was, it seemed, to be
either a detailed recounting of legal acts and their contexts, or thumbnail sketches of authors and
events to be arranged in a picture-window history for the edification of those passing by on their
way to a more perfect state of international law in the near future.

D. Death and Rebirth—The History of International Law after Empire

The morbidity of the history of international law as European historical jurisprudence seemed clear
to Alexandrowicz as early as 1963. He complained that ‘there is no longer much interest in the
History of International Law as such’, and such writing as there was, was ‘a lifeless repetition of
historical slogans about the law of nations’ as having ‘apparently [grown] up among the Christian
nations of Europe only’.135 Writing from Sydney after a decade of researching and teaching in newly-
independent India’s ‘Madras School of Law’,136 Alexandrowicz had been a witness and sympathetic
fellow-traveller in the epoch-making dissolution of empires and colonies into dozens of new nation-
states, accompanied by a rapid ‘delegitimization of any kind of political rule that is experienced as a

343, at 343.
508.
665.
135 Charles H. Alexandrowicz, ‘Some Problems in the History of the Law of Nations in Asia (1963)’ in
2017) 76-82, at 76-7.
136 See Carl Landauer, ‘The Polish Rider, CH Alexandrowicz and the Reorientation of International Law, Part
subjugation’ of a population by alien occupants.\textsuperscript{137} Trusteeship and colonialism went from sacred trusts consecrated by international law, deemed necessary to serve the progress of colonized peoples, into illegitimate states of affairs which retarded progress and ‘therefore had to be eliminated as quickly as possible’.\textsuperscript{138} Between 1945 and 1965, 67 new states were admitted as members of the United Nations (UN), transforming its membership from overwhelmingly western and European to Asian, African, and Latin American by a substantial majority. In 1960 alone, 17 new states joined the UN, 16 from Africa. The result of this revolution in the membership of the society of states had immense consequences for the content of international law: formerly colonial peoples, hitherto assigned to await Europe’s permission to enter into history, wrested the authority to make history for themselves—often through bitter and brutal conflicts with European colonial authorities from Algiers to Jakarta.\textsuperscript{139} Jansen and Osterhammel note that decolonization challenged the ‘conceptual underpinnings of the international order’\textsuperscript{140}: it delegitimized colonialism and racism at the level of international society, and also ‘contributed greatly to the process that gradually made the principle of national state sovereignty absolute and uncontestable.’\textsuperscript{141} Through international law and international

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\textsuperscript{139} See, e.g., Caroline Elkins, \textit{Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya} (New York: Henry Holt 2006); Alistair Horne, \textit{A Savage War of Peace: Algeria, 1954-1962} (London: Papermaca 1996); Matthew Connelly, \textit{A Diplomatic Revolution} (Oxford: Oxford University Press 2003). Cooper notes the startlingly short time span in which different imperial visions of order were eclipsed and replaced: ‘Empire was an ordinary fact of political life as recently as 1935, much as slavery had been in the eighteenth century. By 1955, the legitimacy of any colonial empire was very much in questions. By 1965, the colonial game was over. The two most important competitors for global power represented their power in other terms and exercised power by other means. In 1935, some political movements sought to overthrow the colonial order in the name of new nations, but others sought to expand and make meaningful imperial citizenship, while still others dreamed of nation in a diasporic, non-territorial sense. By the 1960s, the nation-state was at last becoming the principal unit of political organization.’ Frederick Cooper, \textit{Colonialism in Question: Theory, Knowledge, History} (Berkeley: University of California Press 2005) 232-233.
\textsuperscript{140} Jansen and Osterhammel, \textit{Decolonization}, 153.
\textsuperscript{141} Ibid.
institutions, anti-colonial nationalists pursued both state-making and ‘world-making’: ‘rather than foreclosing internationalism, the effort to achieve national independence propelled a rethinking of state sovereignty, inspired a far-reaching reconstitution of the postwar international order, and grounded the twentieth century’s most ambitious vision of global redistribution’. The ‘revolutionary attitude’ of the newly decolonized states to the possibilities of international law and international order held out hope that the true agent for historical progress in the arenas of peace, development, and equality would be the peoples of the nascent Third World—the very term evoking the open-ended horizon of revolutionary world-making potential attributed to the Third Estate.

The ‘darker nations’ now claimed not only their equal rights to sovereign statehood in the present, but also revisited international law’s historical justification for their exclusion: anti-colonial international lawyers—when not directly participating in the new states’ efforts to recast the international legal order to register the priorities and concerns of the third world—also revisited the exclusion of non-European empires and civilizations from international legal history’s account of its

lineage. From Anand\textsuperscript{146} to Syatauw,\textsuperscript{147} Bedjaoui\textsuperscript{148} and Elias,\textsuperscript{149} the first significant rebirth of the history of international law\textsuperscript{150} from its post-war European death was a direct by-product of what Baxi called their ‘verbal vendetta against the so-called European international law’,\textsuperscript{151} concerned to demonstrate the equal and authoritative contribution—or historically-possible contribution—of a range of non-European civilizations to a universal international law.\textsuperscript{152} Influenced by the New Haven School (where each completed his PhD dissertation under McDougal’s supervision), both Anand and Syatauw argued that the transformation of international society effected by decolonization also necessitated a transformation in the value foundations of the international legal order.\textsuperscript{153} The discernment of the values which must be made fundamental to a new international law, was achieved in no small part by revisiting the political histories of Asian political societies and their legal-political relationships, as well as by an assessment of the contemporary economic and political condition of post-colonial states. Bedjaoui’s vigorous defence of the legal personality of the Algerian


\textsuperscript{150} As Liliana Obregon has noted, there was a somewhat similar dynamic in the late nineteenth and early twentieth century in Latin America, in which jurists insisted first on Latin American states’ equal civilized status, and second, developed a regional practice and discourse which reflected an autochthonous theory, practice and doctrine of a law of nations, exemplified in the repudiation of the standard of civilization of statehood found in the 1932 Montevideo Convention: Obregon, ‘Peripheral Histories’. See Arnulf B. Lorea, \textit{Mestizo International Law: A Global Intellectual History 1842-1933} (Cambridge: Cambridge University Press 2015) and Juan P. Scarfi, \textit{The Hidden History of International Law in the Americas: Empires and Legal Networks} (New York: Oxford University Press 2017).

\textsuperscript{151} Upendra Baxi, ‘Some Remarks on Eurocentrism and the Law of Nations’ in Anand, \textit{Asian States}, 3-9, at 5.


revolutionary movement, and the lawfulness of its armed struggle against France, began with a detailed contestation of the historical claim that the Algeria was not a state under international law before 1830, or that it have ever been lawfully annexed.154

The recovery of doctrines and practices as part of a wider recounting of global zones of encounter between historical political orders (empires, kingdoms, principalities), each developing relatively indifferently to each other until drawn into uneasy coexistence, and ultimately competition with, and domination by, Europe, was the heart of Alexandrowicz’s substantial and erudite corpus.155 At stake was an empirical repudiation of 19th century historicism’s Eurocentric ideal of universal law and civilization as having only ever been a 100-year conceit, within a narrowed vision of international law as positive European legal acts reflecting the will of European sovereigns. Alexandrowicz’s belief in the inter-civilizational openness of the early modern European natural law jurists (such as Grotius) has been challenged,156 but the political stakes of his historical work were evident for all to see: the end of formal colonialism now brought forward the possibility a truly universal law of international community, reflecting its reconstituted membership and their civilizational legacies, reviving the content of natural law doctrines made real once more after the 19th-century Eurocentric hiatus.157

The recovery of this inter-polity practice from the 16th, 17th and 18th century encounters between European and non-European political orders signalled a hoped-for reconciliation of universal law and universal history in the anti-colonial present.158 Moyn notes that this interest in ‘the

154 Bedjaoui, Law and the Algerian Revolution, chapters 1-2.
155 Pitts and Armitage, Law of Nations.
156 See Pitts and Armitage, Law of Nations, 1-32; Pitts, Boundaries.
158 Landauer astutely observes that this narrative of declension (from early modern jus natural universalism to Eurocentrism) and renewal through the rise of the Third World, was itself a romantic trope: Carl Landauer, ‘CH Alexandrowicz and the Reorientation of International Law, Part II: Declension and the Promise of Renewal’, London Review of International Law 9(1) (2021) 3-36, at 30.
search for reasons to think that the peoples of the world had once engaged in lawmaking on an equal (or more equal) footing’ was ‘widespread’ as ‘decolonizing international lawyers were often quite insistent that the inequality of peoples canonized in international law as a result of modern empire had been the exception rather than the norm’.\textsuperscript{159} Within Europe, some persisted in one version or another of the view that international law as both essentially a European civilizational achievement\textsuperscript{160} and that it was already universal. But for the most part, European legal history travelled a different and circuitous path,\textsuperscript{161} in which international law occupied even less significance.\textsuperscript{162}

Studies in antiquity and the Middle Ages, implicating the nature of what we might today call inter-polity legal relations, continued, while Stolleis revisited the 18\textsuperscript{th} and 19\textsuperscript{th} centuries in a dispassionate inquiry into German public law and its connection with Germany’s particular natural-law ideas of state science. Fisch, notably, studied the legal mechanisms of European colonialism from 1500 with a sober and critical eye to the role of law in justifying and enabling European expansion, employing both a legal-historical and political historical approach.\textsuperscript{163} He would later expand his interest to the history of the concept of self-determination in public and international law. In French, the work of Peter Haggenmacher pioneered a rigorous revisiting of Gentili, Grotius, Vitoria, Vattel and other less well-known early modern \textit{jus gentium} and \textit{jus naturale} writers. Haggenmacher’s meticulous and weighty reconstruction of the origins of the just war doctrine,\textsuperscript{164} and other essays exploring the early modern legal thought of what he called the ‘extraterritorial legal

\textsuperscript{159} Moyn, \textit{The High Tide}, 15.
\textsuperscript{160} Jan H. W. Verzijl, \textit{International Law in Historical Perspective} (Leiden: Sijthoff 1969, 10 vols.) follow essentially a doctrinal history of European, and later North American, legal acts.
\textsuperscript{161} See Duve, ‘German Legal History’; ‘What Is Global Legal History?’.
\textsuperscript{162} Hueck, ‘The Discipline’.
order’, 165 recovered the discontinuities as much as the continuities of this vein of legal writing with contemporary international law. Its nuance and comprehensiveness would ensure that it remained an indispensable starting place for the next generation of scholars (lawyers and historians) turning to the history of international law, the history of international political thought, and the history of global legal ordering, from 1990 onwards.

One of the few works emerging from the English-speaking world in the late 1980s was Stephen Neff’s *Friends but No Allies*, 166 which recounts the liberal ideal of free trade as a partial and one-sided cosmopolitanism of the West and its allies, and searches in the history of international law to discern the possibility of a more robust idea of an institutionalized global economic order that would realize a true economic cosmopolitanism. Strikingly, Neff maintains that the historical alternative to liberal free trade is to be found in the New International Economic Order’s ‘grand manifesto for a social democratic system of world economic order’, 167 but its implementation was being thwarted by Western dominated institutions such as the IMF and World Bank. For Neff, perhaps like Nussbaum, the distant and the recent pasts of international law—for all their folly, power-politics, and rapacious self-interested action—always reveals the possibility of a direction of travel towards a more universal legal, political, and economic order in which the kernel of an ancient natural law of human flourishing can be discerned. 168 Carty’s *The Decay of International Law* declared itself to be a ‘contribution to theory’ rather than a history of any kind. 169 But along the way to trying

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167 Ibid 191.
168 This has been a consistent feature of Neff’s approach to the history of international law: see, for example, Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press 2013).
to reconstruct the methods of international legal argument about concepts such as custom, territory, and self-determination, Carty reached backwards into 19th century European international legal texts, revealing these concepts’ deep indebtedness to European historical jurisprudence and in particular to followers of Savigny.\(^{170}\) In this Carty was perhaps one of the first to resurface, albeit somewhat obliquely, the extent to which international legal thought was a 19th century European project.

E. Our Perpetual Present-Past

Moyn describes the anti-colonial legalists of the 1960s as ‘the last Hegelians’, noting wistfully that their visions of a reconciled true universality *in history*—which shaped many fields of international law, including human rights,\(^ {171}\) state succession, trade and investment, and the use of force, between 1960 and 1980—‘all came to naught’.\(^ {172}\) Their attempt to ‘de-racialize and globalize a tradition that had prioritized collective freedom in and through the state’ failed, undermined from the outset by armed interventions, political intrigue, economic pressures, and efforts by major powers to maintain means of proxy influence and control; and besieged from the late 1960s by rapidly changing economic conditions, debt crises, and civil conflict.\(^ {173}\) An ascendant neo-liberal economic, political, and legal project, gestating in academia and other institutions for at least two decades,\(^ {174}\) upended

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\(^{170}\) Ibid, chapters 3-4.


the domestic and international post-war political-economic regimes, from national welfarism to financial and corporate regulation. The 1989 collapse of the Soviet Union and its Eastern European empire bookmarked a moment in which the accelerating liberalization of trade and capital flows, and a wider financialization of the economy, was cheered on by a renewed vulgar historicism in which the adoption, diffusion, or even imposition, of Western political, economic, and legal orders were identified as the key to the realization of progress in history—peace, prosperity, and human rights. A resurgently self-confident liberal democratic west—economically ascendent and seemingly politically victorious over its greatest ideological competitor—could claim once again to be the sole normative and empirical exemplar to other nations and peoples seeking the same outcomes. Enjoying its longest continuous peace in history, Western Europe could slough off the shadow of being ‘the dark continent’ and revel in a Kantian dream come true: an integrated legal order of liberal democratic states, whose rapid expansion to the East was at once a civilizational project and a pronounced victory of legal ideas over political substance. Technological change and

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deepening economic integration over the final decade of the 20th century produced the distinctive experience of an acceleration of the rate of change in social, political and economic life.\footnote{Hartmut Rosa, Social Acceleration: A New Theory of Modernity (New York: Columbia University Press 2013) 301. Rosa’s definition of social acceleration is compact and useful: “the acceleration of social change” means the following: the intervals of time for which one can assume stability in the sense of a general congruence of the space of experience and the horizon of expectation (and hence a secure set of expectations) progressively shrink in the various domains of society, whether these are understood in terms of values, functions, or types of action, although this shrinkage neither occurs in a unilinear way nor at the same tempo across the board. Thus the acceleration of social change can be defined as the increase of the rate of decay of action-orienting experiences and expectations and as the shortening of the periods of time that are defined as “the present” in the respective spheres of society.”}

Writing at the very end of the twentieth century to inaugurate the new Journal of the History of International Law, Canadian jurist and former European Court of Human Rights judge, Ronald St. John Macdonald (aged 71 at the time) lamented that ‘the history of international law had been neglected for many years’, and declared with a patrician gentility that the purpose of the journal was to ‘contribute to the effort to make intelligible the international legal past, however varied and eccentric it may be, to stimulate interest in the whys, the whats and wheres of international legal development, without projecting present relationships on the past, and to promote the application of a sense of proportion to the study of modern international legal problems’.\footnote{Ronald St J. Macdonald, ‘Editorial’, Journal of the History of International Law, 1(1) (1999) 1-6.} The opening essay of the first issue, by Philip Allott, augured the providential possibility of rediscovering the history of international law as a history of societal consciousnesses:\footnote{Philip Allott, ‘International Law and the Idea of History’, Journal of the History of International Law 1(1) (1999) 1-21.} ‘The writing of the intrinsic history of international law—the history of the law itself—will reform our consciousness of the identity, the functioning, and the potentiality of international law as law. The writing of the extrinsic history of international law—its relationship to the history of other social phenomena —will reform our

consciousness of the role of international law in the forming, re-forming, and remaking of international society.184

Awakening from deep slumber, the Rip van Winkle of international legal history opened its eyes to a world transformed. Although one notion of international legal history looked to recover its relationship as scribe and augur of world-historical processes, already by the 1999 founding of the Journal, a critical and disillusioning perspective on the claimed historical lineages of a triumphant Western present, had begun to emerge. Well before international legal history’s post-2000s ‘boom’, the Harvard-centric ‘New Approaches to International Law’ network of scholars had begun to challenge the weak providentialism of international law as a means and an end of progress.185

Kennedy’s 1987 book-length article on the Move to Institutions186 reprised (almost ad nauseum) the historical claims—eminently practical pasts—made to legitimate and authorize international institutions, reflecting on these claims as immanent to the wider field of discourses that structure the range of available positions one may take as an international lawyer at any moment in time. In Kennedy’s work, historical narrative and historical claims are discourses like any other, deployed to inflate or deflate the authority of a professional vocabulary and buttress the persona of a professional habitus; writing a different history, or writing history at all, was irrelevant to his endeavour.187 Some of his students, however, were concerned to advance historical claims about international law and its structuring provenances and problematics, and to trace the histories of some of its significant legal-conceptual formations and institutional thought-constellations

184 Ibid 20.
185 Deborah Z. Cass, ‘Navigating the Newsstream: Recent Critical Scholarship in International Law’, Nordic Journal of International Law, 65 (1996) 341-383. Exactly how international law – chastened by political realist critique and diminished in post-war positivist legal theory to mere positive morality – came once more to be associated with liberal idealism in the United States and beyond, is an intellectual history that remains to be reconstructed.
186 Kennedy, ‘Move to Institutions’.
(interleaved with some discussions of institutional histories and practices). Most notable\(^{188}\) were a series of articles published by Anthony Anghie from 1996 to 2002, published in revised form in his 2005 book, *Imperialism, Sovereignty and the Making of International Law*. Bringing together disparate dimensions of a critical sensibility that connected the anti-colonial repudiation of civilizational concepts in international law with post-colonial studies’ interests in discourses of colonial and imperial rule, and their extensive lineage in canons of Western political and moral thought, Anghie’s work was published in book form in the aftermath of the invasions of Afghanistan and Iraq and in the midst of a renewal of a strongly civilizational neo-trusteeship discourse addressing the limits of sovereignty in circumstances of state failure;\(^{189}\) a crucial axis of this discourse was also the racialized critiques of Islamic religious law and practice, and of the failures of Arab governance since decolonization.\(^{190}\) The parallels with Anghie’s recovery of the central role of imperialism and colonialism in the fundamental legal-conceptual vocabularies and governance ideals of early modern and 19\(^{th}\) century international law were hard to miss. Various pillars of late-20\(^{th}\) century liberal internationalism—mainstays of 1990s US foreign policy thinking\(^{191}\) such as economic liberalization, democracy-promotion, human rights-promotion, humanitarian intervention, and atrocity prevention—emerged in the rear-view mirror as a cohesive and historically-recognizable imperial project, lending a strong sense of urgency to the recovery of our recent imperial and colonial pasts’ relationship with our present legal imagination. Gerry Simpson’s 2004 book, *Great Powers and Outlaw*

\(^{188}\) Important also are Berman’s articles on nationalism from the early 1990s. See: Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism and International Law* (Leiden: Brill 2012).


States, astutely refracted the 1990s discourses of rogue states and humanitarian intervention through 19th and 20th century legal discourses of political and juridical hierarchy in international order, and presciently indicated the extent to which great powers shape the normative stakes of international order and the meanings given to its rules governing lawful violence and its ends. The result, for the 2004 reader of his book, is a sense that ‘we have been here before’, and also the sense that the past can provide some clues in the present as to where we might be going.

Koskenniemi’s Gentle Civilizer (published before the Iraq War but after the attacks of September 11 and the invasion of Afghanistan) rendered imperial and colonial projects—along with other intra-European elite projects such as peace and the humanization of (European) war—at the heart of late 19th century European discourses of international law, and as indispensable to international law’s disciplinary ideal of being a means and end of progress in history. Narrated with great flair, and kaleidoscopically detailed and evocative of ‘people with projects’,[192] The Gentle Civilizer was an inimitable and in many ways genre-defying text, that recovered and placed into relation innumerable major and minor figures and their writings. As such, it not only broke dramatically with what had been understood to be genre of ‘the history of international law’ up to that moment, but also—through its prodigious source material and juxtapositions—opened multiple lines of inquiry that would be pursued by others.[193] Innovative in its deployment of intellectual historical methods alongside prosopography, while drawing extensively on secondary sources from imperial, legal, and political histories, The Gentle Civilizer was distinguished by its wide potential audience: a whole new

[193] See, for example, the interest in examining the formation of national professional associations of international law as a means to grasp the construction of the discipline, or the pursuit of intertwined histories of ideas with biographical accounts of major and minor figures, such as: Vincent Genin, Le laboratoire belge du droit international: Une communauté épistémique et internationale de juristes (1869–1914) (Bruxelles: Académie Royale des Sciences des Lettres et des Beaux-Arts de Belgique 2018); Paolo Amorosa, Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law (Oxford; Oxford University Press 2019).
generation of international lawyers, certainly, many probably reading it as their first encounter with
what the ‘history of international law’ could reveal and teach them, but also historians of European
public law, international and imperial historians who were increasingly turning their attention to the
role of lawyers and legal ideas,\textsuperscript{194} and intellectual historians and historians of political thought
intrigued to find what they understood to be political and social theoretical thinkers (Durkheim, Schmitt,
Morgenthau, to name a few) cast in an international legal dramatis personae.

The \textit{Gentle Civilizer} can, without too much hyperbole, be seen as a powerful detonator of the
explosive growth in scholarship concerning the history of international law; but the width of its blast
radius cannot be explained by the text alone. By the time the \textit{Gentle Civilizer} had published,
disciplinary preoccupations within academic history (Chakrabarty’s ‘cloistered history’) had already
shifted to reflect much greater interest in the lineages of contemporary international political
discourses and a wide-range of economic, institutional, cultural, and legal transformations occurring
under the ‘now-concept’\textsuperscript{195} of globalization. Moreover, several cycles of transformation and critique
within different subfields of history were presupposed by the prolific interest in the global,
international, and imperial, and its law-related objects and subject. Closely conjoined with anti-
colonial legal scholars’ recovery of a differently-constituted universality of civilizations in the
immediate aftermath of decolonization, the first generation of post-imperial and post-colonial
nationalist historiography tended to find deep historical roots for newly-decolonized nation-states’
national projects, often through the historical categories and conceptual armatures of European
thought.\textsuperscript{196} As Chatterjee remarked in 1986, ‘even as [Nationalism] challenged the colonial claim to
political domination, it also accepted the very intellectual premises of “modernity” on which colonial

\begin{footnotes}
\item[196] E.g., Bedjaoui, \textit{Law and the Algerian Revolution}.
\end{footnotes}
domination was based'.

Nationalist historiographies provoked in some places powerful post-colonial rejoinders and counter-histories, unsettling the modernist horizons of post-imperial national histories and also criticizing the ruling elites’ national projects as reproducing structures of domination (economic, institutional, and conceptual) inherited from colonial rule.

Imperial history in the west after decolonization ceased to be a history of the formal expansions of empire and its imperial acts, and began to interrogate recent European empires’ self-interpretation and self-referential concepts of civilization—examining 19th and 20th century European colonialism as extensive and intensive processes that shaped almost every aspect of the modern world, both within the metropole and within the colony. Social, cultural, and intellectual historical methods—themselves rising to prominence and contestation during diverse disciplinary trends between 1950 and 2000—were increasingly brought to bear on a very wide range of phenomena connected to the imperial and the colonial.

As Ghosh helpfully summarizes,

“This ‘new’ world history is increasingly shaped by our urgent need to understand and historicize our own globalized condition from the perspective of many locals. . . . The new global/imperial history presumes a de-centered narrative in which there was no one driving force but rather multiple and unmanageable systems, processes, imaginaries, and contingent events that pushed a diversity of nations, empires, and communities; [This iteration] of world history offers agency, subjectivity and history to those who participated in a global economy and ecumene, and it fundamentally

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198 Notably, various authors in the Subaltern Studies group: Ranajit Guha, Dipesh Chakrabarty, Gayatri Spivak, Gyan Pandey, Sudipta Kaviraj, and Partha Chatterjee; but see also the scholars associated with Ashish Nandy’s Centre for the Study of Developing Societies (Delhi), the Ugandan Makerere Institute, and the Dar es Salaam group of Samir Amin, Andre G Frank, Immanuel Wallerstein and Giovanni Arrighi. For a reflection on the lasting impact of these schools of thinking on the histories of imperialism after 1950, see the essay by the late Patrick Wolfe, ‘History and Imperialism: A Century of Theory, from Marx to Postcolonialism’, *American Historical Review*, 102(2) (1997) 388-420. For critique of the end point of these critiques, and their blind spots, see Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Oakland: University of California Press 2005).

destabilizes the longstanding binaries of subjection and dominance in a range of historiographies between metropole and colony … Europe and non-Europe.\footnote{Durba Ghosh, ‘Another Set of Imperial Turns?’, \textit{American Historical Review}, 117(3) (2012) 772-793, at 779.}


Pioneering in developing this insight in the direction of a \textit{global} legal history, was Lauren Benton’s 2002 book \textit{Law and Colonial Cultures}.

Extending global historical approaches to develop an account of ‘global legal politics’, Benton’s original and field-shaping book traced the complicated and recursive relationship between multiple legal orders, as they clashed, rivalled one another, and interacted competitively and cooperatively \textit{in situ} in metropolitan and colonial spaces. The picture drawn in the book defies easy synopsis, but it demonstrates extensively that the apparently discrete categories and taxonomies on which our 20th century concept of an ‘international legal order’ were erected—state, territory, sovereignty—emerged through a continuously played out ‘global legal
politics’ in which ‘[intra-colonial] jurisdictional disputes, struggles over the legal status of cultural and legal intermediaries, conflicts over the definitional and control of property’ \(^{205}\) shaped a global cultural politics centering on rules about law. Benton later extended the implications of this approach to develop the concept of ‘interpolity law’ as an object of historical inquiry. More capacious and diverse than ‘international law’ (and indeed, highlighting the parochialism and Eurocentrism of the latter as an object of inquiry), researching ‘interpolity law’ endeavours to examine the ways in which global legal politics produced complex legal spaces and repertoires of legal thought and action, involving legal relationships ‘among a range of political communities, including empires, micro-states, and various corporate communities, such as merchant diasporas, trading companies and municipalities’. When we take such a lens of inquiry into the historical past of law and its subjects and objects, we see that

The early modern period teems with pluri-political formations … Interpolity zones often developed within one or more imperial spheres of influence, including some under the sway of non-European empires, and those formations … were fluid and surprisingly stable over time. In the long nineteenth century, the period from roughly 1780 to 1920, these formations changed in ways that helped to produce conditions conducive to the rise of the interstate order. A handful of ascendant world powers … attempted to assert dominance over regional interpolity zones and to construct global prohibition and treaty regimes … And polities within or on the edges of empires maneuvered to defend sovereign or quasi-sovereign rights, as did confederations and other pluri-political formations that emerged to counterbalance imperial power. \(^{206}\)

Empires are always empires of the mind, as well as of people and places, projections from inner space that depend on ‘ocean-crossing ideological constructs’, \(^{207}\) in which discourses of justice, right, and law are fundamental dimensions. No empire ever existed without normative orderings and

\(^{205}\) Ibid 263-264.
\(^{207}\) Cooper, Colonialism in Question, 237.
their justifications. Emergent currents of imperial and colonial history overlapped with—and no
doubt influenced and were influenced by—a contemporaneous revival of international intellectual
histories. Armitage points out that mid 20th century disciplines such as international relations
thought absorbed and were nourished by a strong connection with the history of political and legal
thought (part of the entropy of German historicism and its crisis). Delivered initially as the Carlyle
Lectures in the Hilary Term of 1991—as the US-led war against Iraq was unfolding and heralded by
many as inaugurating welcome new possibilities for the UN-authorized military enforcement of
international legal norms—Richard Tuck’s *The Rights of War and Peace* made early modern and
Enlightenment discourses of just war and international order, and their relationship with Europe’s
imperial and colonial expansion, a newly fertile object of inquiry in the history of political thought.
Armitage’s own early book took the ideological origins of empire as its principal concern, showing
it to be a construct in which discourses of ‘political thought’, ‘legal thought’, and ‘religious thought’
merge into a capacious and effective frame of European ‘international political thought’ that was
an indispensable scaffolding for emergent projects of colonization, empire, and state-building within
and without Europe. Between 1991 and 2021, intellectual history—including, but not limited to, the
history of political thought in Europe—has dug deeply into a rich vein of texts and contexts that
reveal the constitutive relationship between jus gentium and jus natural discourses, and the ‘ocean-
crossing’ ideational, normative, and material constructs that contributed towards an imperial and

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colonial global order; the preoccupations of this kind of intellectual history have greatly enriched our sense of even relatively recent pasts, and the role of languages of political and legal thought in making and breaking those pasts.\(^{213}\) It has also greatly complicated some of our received understandings of the role of certain kinds of political theory and its relationship to what we might now call the international, and also with the colonial.\(^{214}\)

The special place of intellectual-historical approaches to studying law and legal discourses should come as no surprise. Understanding how concepts retain a stable meaning \textit{despite} transformations in their surrounding economic, social, institutional, theological, and political contexts is as central as understanding how their meanings and applications change as a result of such transformations; stasis, and metastasis are both equally important symptoms of deeper levels of change—whether we wish to call these structural, systematic, or something else. Sometimes (legal) concepts lead and sometimes they lag, but the world does not change without them. As Koselleck remarked in his 1986 address to a convention of German legal historians,\(^{215}\) we might observe a remarkable repeatability in the content of some legal concepts, allowing us to discern ‘legal sources that aim at application on the basis of their self-statement, sources whose meaning cannot be


\(^{214}\) See two recent studies of Bodin: Daniel Lee, The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations (Oxford: Oxford University Press 2021) and Milinda Banerjee, The Mortal God: Imagining the Sovereign in Colonial India (Cambridge: Cambridge University Press 2018). The former revisits the theory of sovereignty in Bodin and shows the significance of the jus natural and jus gentium to be far more important that previously appreciated. The latter examines the reception of Bodin into political thought in colonial India, and its impact on 19th century anti-colonial nationalist thought.

reduced to the singular situation in which they emerged or to their singular history of effect … an iterative temporal structure that differs from sources that remain imprisoned in the history of events’.216 This, in some historical contexts, might allow us to maintain (as some legal historians do)217 a strict demarcation of legal history which ‘concentrates on texts that transport genuinely legal contents and uses neighboring disciplines only in a supplementary way’.218 Equally necessary is ‘a flexible differentiation [which] reaches out to other fields, revealing that legal history cannot in any way do without political, social, or economic history, without the history of religion, language, or literature, and so forth’.219 Law has its inner, often much slower, dynamics of conceptual change, just as its relationship as an expression of or reaction to changing economic and social hierarchies can follow a different temporality: ‘Every law can be read as a reaction to hitherto unregulated or newly emerging problems, or as a regulative instance for certain conflicts that take place outside legal boundaries. To this extent, legal history remains embedded in general history, in political and social and socioeconomic history, and, more recently, the history of technology’.220

Working along the seamline between international law’s environments of determination (diplomatic relations, international organizations, networks of transnational actors such as corporations and NGOs), and its inner determinations of meaning, has perhaps become one of the most fertile places for inquiry into the historical pasts of the international and its law-related objects and subjects. In part this reflects the rise and transformation of another subfield of cloistered history since 1990, that of ‘international history’. In a helpful recent retrospect on this field, Manela221

216 Koselleck, Sediments of Time, 132.
218 Koselleck, Sediments of Time, 133
219 Ibid.
220 Ibid 134.
suggests that the last 30 years have seen a shift towards histories of the international as a distinct social, economic, and political space of relationships, interactions, imaginary, and network of ideas and actors. It is a mode of history that operates across different scales and also temporalities—spaces within states but densely connected across and between them; institutions that are by definition ‘international’ (such as international organizations)\textsuperscript{222}; international project-concepts (liberal constitutionalism, global health, global development and growth, human rights, humanitarianism, sustainability, state-building, and peace-building)\textsuperscript{223} that circulate within explicitly international spaces but are transported into national political and economic institutions through a variety of agents, and suffer a variety of fates; as well as internationally embedded and redescribed political and social concepts (such as minority protection, self-determination, sustainable development, human rights) that are taken up, mobilized, materialized, and performed by a variety of agents. It will be evident that here, political, economic, cultural, social, and intellectual histories intersect with histories of international legal acts and international legal expertise, often in relation to


paradigmatic international institutions such as the League of Nations but also in respect of examining the in situ workings out of international projects of politics and expertise through histories of international administration, development programming, vaccination, and hunger alleviation projects and so on. Some historical excavation in this field is also undertaken through anthropological and sociological studies of the international as concrete spaces of people and ideas, in which global legal regimes (formal and informal) are accounted for as emerging diachronically as a result of the competition and collaboration of actors wielding and pursuing certain kinds of social, economic, institutional, or symbolic power. Historicization is an indispensable part of such ‘reflexive sociologies’.

At the crossroads of intellectual history and international history, a special place should be reserved for histories of human rights, a field perhaps no more that 12 years old in its current form but already arguably into a second or third generation of scholarship. Reflecting in many ways the above narrative of suspicion of, or disillusionment with, the new historicism of 1990s liberal international legal and political discourses, long-standing critiques of the political project of human and constitutional rights from both the left and right contributed to a historical repudiation of stale just-so stories about the rise of human rights ideas and their self-evident progress in history. Historicism 1, reloaded, turned once more against a reinflated Historicism 2. Moyn’s prodigious and


225 Most owe their methods to Bourdieu, who emphasized historicization as the starting point for any sociological inquiry: See Pierre Bourdieu, Jean-Claude Chamboredon and Jean-Claude Passeron, *The Craft of Sociology* (1968, Berlin: de Gruyter 1991). Anthropology’s interest in historical methods and its own “archival turn” can be discerned from its engagement with Foucault, from the late 1980s: Paul Rabinow, Ann Stoler, and Sally Merry, to name a few.

original writing (3 books in 8 years)\textsuperscript{227} blazed a trail, but it was evident by the speed with which the research agenda took shape and advanced that a bone-dry tinder had been accumulating for a decade or more. The result was a torrent of work, almost all of it done by intellectual historians and international historians, which began a near-total renovation of the stories by which we understand how human rights ‘came to the world’, died, and lived again. No single narrative or reductive account can do this body of work justice, but it can be said that we have increasingly rich, contextual, historically-complex stories about: the lineages of specific rights-concepts;\textsuperscript{228} specific treaty regimes;\textsuperscript{229} rights as discourses and political vocabularies in (mostly European) intellectual history;\textsuperscript{230} anthropologically oriented work on the social and political lives of rights practices and concepts;\textsuperscript{231} human rights in the global crucible of decolonization and anti-colonial wars;\textsuperscript{232} human


rights advocacy movements and organizations, and human rights and neo-liberalism. The results were, predictably, disturbing to many claims about what the progenitors of human rights might have been, and also to deeply ingrained assumptions about the conditions under which they failed or succeeded to rise as a lingua franca of global morality. A polemical edge to these criticisms was consistently provided by Moyn, who argued—particularly from 2018—that human rights’ relationship with projects of transformative political change was largely one of containment and temporization. Human rights could, at best, be yoked to a different political project altogether, but were not a transformative project in themselves.

F. What comes after the History of International Law?

This necessarily schematic tour of the horizon of inquiry into the many historical pasts that shape, and are shaped by, international law reveals that the renvoi to history is not one project, nor is it necessarily a self-declared critical project. Neither international lawyers nor historians have any special claim to be prophets of our time, and we ought to be skeptical of such postures. To

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paraphrase Nietzsche: Objectivity and Justice do not necessarily have anything to do with each
other; but equally it seems right to say—as we have seen repeatedly in the seemingly magnetic
attraction between forms of historicism and stories of international law’s development—that ‘certain
historical experiences … have all been only possible because the individual histories or the entirety
of history remained saturated with interpretive frameworks of possible justice’.236 Seeking to discern
conditions for possible futures, we seem predisposed to reach for understandings that allow us to
‘hermeneutically absorb [our experience of history] in order to live’.237 Our relationship to the
possibilities of history appears to rest, if not on the perpetual recreation of grand theories of history
in the mode of Historicism 1 (although it is clear that we still do that), then on some kind of ‘theory
of the conditions of possible histories’. Koselleck calls this Historik, in contrast to the ceaseless flow
of events and experience that are examined in Historie. Historik ‘asks about the theoretically
discernable presuppositions that make conceivable why histories occur, how they unfold, and,
likewise, how and why they must be examined. Historik thus aims at grasping the double-sided
nature of each history, encompassing both a cluster of events and its representation’.238

As we have seen, inquiries into the historical pasts of international law can encompass a very
large range of subjects and objects, as well as temporalities: short, long, structural, life-stories, and
event-histories. It is also clear that one very important quality of contemporary inquiries is that they
embed a range of forms of historiographical thought, with differing approaches to methods,
concepts of sources, the identification of relevant phenomena and objects, and so on.

Historiographical thinking seems to me to rest on Historik, and as such is a form of political thought

236 Koselleck, Sediments of Time, 127.
237 Ibid 43.
238 Ibid.
in itself, an observation made in numerous ways by Pocock since at least 1962.\textsuperscript{239} Our sometimes querulous and ungenerous debates about what international legal history \textit{really} is and what it \textit{should} be in order to be critical, or something else, appear to me to boil down to debates about \textit{what kinds of theory of history} should underlie our historiography. Desautels-Stein and Moyn, for example, argue that the US-centered project of (domestic) ‘critical legal history’ began with ‘big thinking, grand theory, and programmatic approaches to historical explanation and social transformation’, but has now been supplanted by ‘the minimalist, the pragmatic, the particularistic and the quotidian. This is the platform of problem-solving, sifting debris in the here and now’.\textsuperscript{240} They acknowledge that various tools of an originally critical methodology, such as genealogy and the revelation of the contingency of historical outcomes, ‘launch[ed] a thousand dissertations and illuminated substantial corners of the historical past’, but argue that the goal of critical history was to ‘forge an intellectual practice capable of emphasizing the ability and reclaiming the right for humans to make their own society so that it expresses their … freedom as much as possible’.\textsuperscript{241} Showing the contingency of our present-past is rightly comprehended as a limited exercise, although not a useless one, if, for example, one’s principal objective is to show the non-naturalness of certain features of the present. But the political and social consequences of any given historical claim, and the use that we can make of it in the present, rests (as the Desautels-Stein and Moyn rightly accept) on a wider set of social- and political-theoretical presuppositions that may not be derivable from the historical inquiry at hand—or any other historical \textit{inquiry} for that matter. Rather, these presuppositions arise from a posture towards


history and its uses; that posture can be derived from a wide range of available positions, which are
temselves endowed by history and rendered accessible (and plausible) only through historical
narrative. Each historical narrative can be contested, rendered more or less plausible by the gnawing
criticism of historians but also by the wider economic, social, and political world in which it is
received and debated: To say that we must learn lessons from the past in order to shape a better
future—however we conceive the latter—is to have some sense of the conditions under which a
historical plotline developed and rendered plausible by the historian, answers questions posed by a
transformation of experience which can no longer be answered by histories transmitted thus far.
These conditions are, inevitably, historical facts (Historie), but the meaning we endow them as answers
to new questions posed by our transformed experience, requires Historik. Put more poetically by
Collingwood, our ‘world is infested by sphinxes, demonic beings of mixed and monstrous nature
which ask [us] riddles and eat [us] if [we] cannot answer them’.

For some, the pluralizing and centrifugal forces of many different methods, objects, subjects,
and temporalities in the history of international law will be regarded as evidence of a desert of the
real: only fragmented inquiries, disconnected narratives, deeply researched plotlines which in the end
don’t seem to point the way to emancipation nor even permit the neurotic satisfaction of clearly-
demarcated scholarly communities and methods (or worse: warring methodological factions which
believe only their approach can vindicate the world-historical function of writing the history of
international law). It is perhaps still too soon to say whether this fear will be realized. But equally
plausible, it seems to me, is that the current state of affairs is a field of a thousand blooming flowers,
in which many candidates can be found for ways of doing the history of international law. Our

243 Koselleck, Sediments of Time, 154.
present condition, perhaps more than ever, entails a culture of experiencing contingency
(Kontingenzerfahrungskultur) rather than seeking to overcome it once and for all
(Kontingenzbewältigungspraxis). Our possible and plausible futures are shifting rapidly, and this has
arguably provoked an equally constant shifting of relationships to our present-pasts. The redrawing
of our path to the Now is constantly unsettled and a variety of strategies remain possible:
continuities intimating the rightness of certain current pathway, as well as radical discontinuities
begging a decisionist leap. Our present problem is not to pitch one against the other as a strategy of
subversion against a dominant mode of thought, but to navigate the constant availability of these
alternatives in a fragmented present in the hope of picking a winner. The result is not complacency
but a constant vigilance; not a certitude of what critical method must be, but a critical and reflexive
openness to what can be learned. This, it must be recognized, sits uncomfortably with many of the
realities of modern academic production, but is not yet rendered completely impossible by them.

In this perspective, we might see many exciting lines of possibility in contemporary research.
The frontiers of imperial and international history hold out some ways forward to overcome the
Eurocentric presumptions that have long dogged the history of international law. Even as we
continue to recover the many ways in which international law’s 19th century Eurocentric historicism
was embedded in various sites and political projects, and continued to shape plans for the
remaking of states and societies well into the 20th century, it seems now more plausible to break
from Eurocentric presumptions about where to locate the history of the global and its law-related

245 Veyne, Writing History, 80.
246 Anne-Charlotte Martineau, ‘Overcoming Eurocentrism? Global History and the Oxford Handbook of the
248 Umut Özsu, Formalizing Displacement: International Law and Population Transfers (Oxford: Oxford University
Press 2013); Peter Becker and Natasha Wheatley, Remaking Central Europe: The League of Nations and the Former
Habsburg Lands (Oxford: Oxford University Press 2020); Davide Rodogno, Against Massacre: Humanitarian
subjects and objects. We can cast a wider net which reaches back beyond the 19th century to discern possible histories of a range of inter-polity and inter-imperial laws from antiquity to the 19th century,249 and the various ways in which European international law was far from being passively absorbed or imposed, but sought to be reshaped to reflect specific polities’ structures of law, governance, and power—whether as regional states, notionally less-than-sovereign principalities, or empires that continued to govern large parts of the world through the end of the 19th century.250 China,251 Russia,252 the Ottoman Empire,253 the Princely States of India254 have all been the subject of recent studies, and much work remains to be done in other regions which have long histories of multi-territorial ordering, such as the African continent and South East Asia. Other work has re-examined the specific ways in which international law was used during the 19th century colonial encounter,255 and scoured unconventional archives to examine how seemingly discrete political-legal concepts were enacted and performed by all sorts of agents and practices ‘on the ground’ outside of Europe.256 The vista of possible histories is wide, and an area that seems especially under-researched

249 This approach is fundamentally aligned with what Duve calls global legal history, and it seems to me few, if any, rigid border walls need to be erected between these approaches – Duve, ‘What is Global Legal History?’.
250 Lorca, Mestizo International Law; Obregon, Peripheral International Law.
are 20th century histories of regional international organizations, such as the Organization of American States, the Arab League, the Organization of African Unity, and the Association of South East Asian Nations. International historians, and some international lawyers, 257 have become adept at developing rich intellectual, organizational, and cultural histories of international organizations, and their role in many kinds of legal, political, social, and economic world-making. But a great many possible and plausible histories could still emerge from reconstructing aspects of the histories of such entities and the human beings that enliven them.

Karen Knop has observed that the women have often been absent in histories of the international and global, and its laws, not the least due to their exclusion from the public spaces and roles that have been the focus of so much of this history. It remains an urgent task to recover and narrate ‘a pluralist, quotidian international’258 in which gendered and feminist histories can be told. Knop observes that the turn in European legal history to new histories of international private law promises the possibility of making more visible the agency and experience of women in histories of the international and the global, and its laws.259 A recent edited collection examining women’s international thought260—connected to a wider project of recovery and re-visibilization of significant contributions by women left unrecognized by the canon of international relations scholarship261—demonstrates the significant gap in historical studies that still needs to be addressed. Glenda Sluga’s

259 Ibid.
recent book on international order after Napoleon elegantly and incisively decentres a traditional ‘great (states)men’ story by demonstrating the essential role of women as political actors who helped create the political norms of post-Napoleonic Europe—only to be rendered ‘invisible in the histories that tracked the rise of modern formalized diplomacy and international politics, because historians shared the new modern premise that international politics was the terrain of properly masculine political actors, whether diplomats, foreign ministers, presidents, kings or emperors’.262

In what only 20 years ago would have been called ‘doctrinal’ or ‘internal’ legal history, much interesting research and writing is continuing, greatly enriched by currents of thinking in imperial, global, international, and cultural history.263 Recovering the lineages of doctrine264 remains important, not only for some specific controversies in international disputes, but also to allow us to grasp wider processes through which legal concepts emerge, change, or remain stable in time. Histories of international legal-political concepts (and concept-structures) and the contexts in which they are shaped and transformed, are amenable not only to the methods of intellectual history,265 but also international, diplomatic, and cultural histories.266 Lines between these approaches are increasingly blurry in the study of phenomena such as international organizations and their complex material and political environments, and a whole new generation of historians and international lawyers is showing a prodigious capacity to bring diverse sources and methods together to illuminate

263 See the essays collected in Marcus M. Payk and Kim C. Priemel (eds.), Crafting the International Order: Practitioners and Practice of International Law since c.1800 (Oxford: Oxford University Press 2020).
266 E.g., Megan Donaldson, ‘Survival of the Secret Treaty’.
these histories. Histories using prosopographic methods have examined how the lived-lives of international lawyers intersected with world-making projects (colonial, pacific, economic, and liberal, among others) in Europe and beyond, in which the history of international law was itself part of discursive efforts to justify or repudiate certain projects. Biographical and institutional histories are being productively brought together, often with a social-theoretical and ethnographic underlay, to explore the ‘life of international law’ within international organizations in recent decades.

Accounts of the emergence of professional fields of ‘international law’ within distinct national contexts, and particular styles of thought characteristic of ‘national traditions’ in international law, have been published in recent years or are being written; these continue however to suffer from severe blindspots in relation to the role of women, and the place of non-white or other racialized

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persons as agents in the formation of these professional identities could also be much more extensively examined.

Research that could be described as very much within the ‘history of (European) international political thought’ continues, and still has much to teach us about our received understandings of key political-legal thinkers within the (real or assumed) genealogies of international legal thought. But the lines between international and intellectual history have eroded, with historians of political thought (usually with a keen eye for the logic of political ideas) embracing archival work, cultural and popular writings, as well as sources such as textbooks, letters, and diaries, to write histories of embodied and embedded ideas. Such approaches are often particularly apt to grasp the determining influence of racial and civilizational thinking on the constitution of ideas of international legal order in the 19th and 20th centuries, or the racial and imperial order that was usually assumed to underlie the possibility of international law. Recent work has attempted to

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more closely articulate the connection between sweeping global political and economic transformations such as late colonialism, late imperialism, decolonization, development, and neoliberalism, and international legal ideas and institutions—in particular international economic ordering.277 Other work has carefully traced legal and administrative histories of colonial expansion in relation to specific territories, and the transformation of a territory from colony to mandate to trusteeship in a century-long trajectory of domination and exploitation enabled by the international legal order.278 The history of the laws of war has long been a subject of historical inquiry, although generally focused on medieval or late 19th century origin-stories, with the latter especially prone to being written with an eye to vindicating, or dismissing, the project of humanizing warfare.279 International historians,280 historically-inclined international relations and political theory scholars,281 American legal historians,282 and international lawyers283 have all revisited the history over


281 Scheipers, Mantilla, Kinsella, Kalmanovitz.


the last 20 years. This surge of interest reflects, without a doubt, the fact that these last 20 years have been characterized by a series of ‘endless wars’ against and within weak states and non-state actors, in which the jus in bello and jus ad bellum have not only been stretched and reworked to accommodate an aggressive counter-terrorist military strategy and its aftermath, but in which the relentless logic of trying to achieve political order by military means\(^\text{284}\) has raised severe doubts about the constraining value of the such a legalizing enterprise.\(^\text{285}\) But the histories themselves reveal many hitherto unexamined aspects of the making of the modern laws of war. Van Dijk, to take one example, draws on newly-opened diplomatic archives concerning the drafting of the 1949 Geneva Conventions, to show that while some states, such as Gaullist France, were concerned to vindicate the sacrifices of their resistance movements through greater protections for civilians under occupation, they also joined the United Kingdom and the United States in seeking to protect prerogatives to suppress anti-colonial rebellion, to starve enemy populations through blockades, and to engage in carpet bombing and use of nuclear weapons should they have to go to war against the Soviet Union and its satellite states.\(^\text{286}\)

G. Conclusion

This paper has taken a long retrospective on the idea of a history of international law. It has argued an account of what the history of international law was—an outgrowth of European legal history at the height of its historicism—and proceeded to an argument about what it can be


\(^{285}\) David W. Kennedy, Of Law and War (Princeton: Princeton University Press 2006); Moyn, Humane.

understood to amount to now. Along the way, many detours have been taken, but the basic intuition of this author is that there may no longer be some discrete disciplinary activity called ‘the history of international law’ in any sense relatable to what the study of the history of international law was. Instead, we have a flourishing and proliferating mass of historical inquiries, an intersection of overlapping circles of inquiry taking place in a wide range of academic fields of history. How and whether this historical knowledge serves us in our present is something we can only resolve through an unyielding attention to, and engagement with, the relationship between our inquiries into historical pasts, and our representations of its meaning to each other and ourselves (our very own sphinxes and demonic beings). Between Historie and Historik lies our orientation to possible futures.

We might successfully reimagine these as a ‘story of human sovereignty acted out in the context of a ceaseless unfolding of unitary historical time’—as our most politically effective theories of history have once done—or we might find that what serves us most of all is a theory of history which refuses such an operation. Only time will tell. In the meantime, I think we should follow some advice that can be simply stated, although is harder to follow: avoid wasteful and narrow sectarianisms of theory and method, and look instead for communalities of thinking about the historical inquiry at hand, which can be gleaned from history, sociology, anthropology, political theory, and law. The results could still be surprising.

287 Chakrabarty, Provincializing Europe, 15.
288 Donald Sassoon, One Hundred Years of Socialism: The West European Left in the Twentieth Century (New York: Free Press 1997) 7: To be able to define the contending parties, name them and thus establish where the barricades should go up, or where the trenches should be dug, gives one a powerful and at times decisive advantage.
289 For an early plea to this effect from a historian, addressed to other historians, see Greg M. Dening, ‘History as a Social System’, Australian Historical Studies, 15 (1973) 673-685.
Further Reading


